

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1252-CR

Cir. Ct. No. 2008CF1113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANTELL T. HARBOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Shantell T. Harbor appeals a judgment convicting her of one count of attempted robbery, one count of attempted armed robbery, and one count of armed robbery, all with threat of force. She also appeals an order denying her motion for sentence modification. She argues that her sentence

should be modified based on a new factor and that she received ineffective assistance of trial counsel. We affirm.

¶2 Harbor first argues that there is a “new factor” entitling her to sentence modification. The “new factor” to which Harbor points is a Cedar Creek Counseling sentencing report that presents what she characterizes as previously unknown information about her mental health problems, her addictions, and her traumatic upbringing. “The term ‘new factor’ refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.” *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468, 470 (1997). It is “an event or development [that] frustrates the purpose of the original sentence.” *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989).

¶3 The circuit court’s major focus at sentencing was the need to protect the public. The information in the Cedar Creek Counseling sentencing report sheds light on the difficulties Harbor has faced in the past and currently faces, but does not address the circuit court’s overriding concern in framing its sentence—the need to protect the public. Since the information in the report does not bear on the circuit court’s primary concern in imposing sentence, it is not “highly relevant to the imposition of the original sentence,” and thus is not a new factor. We conclude that Harbor is not entitled to sentence modification based on a new factor.

¶4 Harbor next argues that she received ineffective assistance of counsel because her attorney failed to request a presentence investigation report, which would have allowed her to bring to the sentencing court’s attention

mitigating factors like those that were addressed in the Cedar Creek Counseling sentencing report. ““To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel’s actions or inaction constituted deficient performance and that the deficiency caused him prejudice.”” *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 126, 700 N.W.2d 62, 70 (citation omitted). To prove prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Ibid.* (internal quotation marks and citation omitted).

¶5 Harbor’s claim of ineffective assistance of counsel fails because Harbor would not be able to show prejudice. As mentioned above, the central focus of the circuit court’s sentence was the protection of the public. Had trial counsel ordered a presentence investigation report that more thoroughly addressed mitigating factors, the court may have had more insight into how Harbor came to be who she is; however, the mitigating information would not have undercut the circuit court’s primary concern—that Harbor is currently a danger to the public. Moreover, while the report might have provided more detail, the circuit court was well aware that Harbor struggled with mental illness and substance abuse. The court chided Harbor for not taking her medications to treat her mental illness, noting that she was less likely to be able to act in a reasonable and law-abiding manner when not on her medication. Harbor’s ineffective assistance of counsel claim is unavailing because she would not be able to show that she was prejudiced by counsel’s failure to order a presentence investigation report.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

